HIROTO WATANABE A

v.

LAW YEN YEN & ANOR

HIGH COURT MALAYA, KUALA LUMPUR B
HARMINDAR SINGH DHALIWAL JC
[CIVIL SUIT NO: S-22NCVC-95-2010]
9 JUNE 2011

CIVIL PROCEDURE: *Declaration - Application for - Validity of mutual wills - Whether subsequent will to take effect - Whether mutual wills intended to be irrevocable - Whether new will invalid* C

SUCCESSION: *Will - Mutual wills entered by deceased and plaintiff - Deceased executed new will years later without knowledge of plaintiff - Whether new will valid - Whether mutual wills intended to be irrevocable* D

The plaintiff in this case is the step-father of the defendants. The defendants' mother ('the deceased') had married the plaintiff, a Japanese national, in March 2002 after ending her earlier marriage through a divorce in August 2000. In October 2002, both the E
plaintiff and the deceased made almost identical wills ('the 2002 wills') wherein they declared, reciprocally, that their two apartments at Seri Duta 1 Condo, Taman Duta, Kuala Lumpur ('the Seri Duta properties') would, upon their demise, be given to the surviving spouse. However, in February 2007, the deceased F
executed another will ('the new will') whereby she stated that upon her death all her properties would revert to the defendants. It thus transpired that, upon the death of the deceased, the defendants obtained a Grant of Probate to administer the estate of the deceased. That, rather inevitably, led to the present action G
by the plaintiff in which he sought to declare the new will as invalid, annul the Grant of Probate and effectuate the 2002 wills. The plaintiff, at the end of the trial, had also filed an application to amend his amended statement of claim, essentially seeking for an alternative order that the Seri Duta properties was held on H
trust for him, should the new will be found to be valid ('encl. 32'). Before the learned Judicial Commissioner, the primary issue that arose was whether the mutual wills herein ought to be effectuated, and further, whether encl. 32 ought to be allowed by the court. I

Held:

(1) The term "mutual wills" is used to describe joint or separate wills made as a result of an agreement between the parties to create irrevocable interests in favour of ascertainable beneficiaries. It is trite law that when one acts on the faith of an agreement to make mutual wills, equitable obligations will arise to prevent the offending party from acting unfairly. (paras 7 & 37)

(2) It was affirmed that the plaintiff and the deceased did make mutual wills as the 2002 wills were made at the same time and in almost exactly the same terms. The deceased's concern about the future of herself and her children and the promise she had given in front of the witnesses to the 2002 wills to never change the wills clearly showed that she intended the 2002 wills to be irrevocable. (para 26)

(3) The execution of the new will was done without notice to the plaintiff and certainly without his knowledge and consent. The deceased had thus reneged on her promise to the plaintiff and this was clearly a breach of her promise. (para 32)

(4) Although the application for amendment herein was made very late in the proceedings, it was made *bona fide* and there was no ploy to delay proceedings or to seek some unfair advantage. There was also no prejudice to the defendants since the issue being essentially a legal one and no new witnesses were required or needed to be recalled. For these reasons, and in order to determine the real question in controversy, and in the interest of justice, the court would exercise the discretion in favour of allowing the amendments sought in encl. 32. The court would thus hold that the deceased's last will dated 16 February 2007 is valid and enforceable except that the executors, who were the defendants in this case, would hold the Seri Duta properties on trust for the plaintiff in accordance with the terms of the 2002 wills. (paras 48, 49 & 50)

Case(s) referred to:

Birmingham v. Renfrew [1936] 57 CLR 666 ***(refd)***

Bumiputra-Commerce Bank Bhd & Ors v. Bumi Warna Indah Sdn Bhd [2004] 4 CLJ 825 HC ***(refd)***

Charles v. Fraser [2010] EWHC 2154 (Ch) ***(refd)***

Datuk Dr Soon Choon Teck v. Datuk Robert Lau Hoi Chew & Ors [2010] 7 CLJ 931 CA ***(refd)***
Dufour v. Pereira (1769) 1 Dick 419 ***(refd)***
Fry v. Densham-Smith [2010] EWCA Civ 1410 ***(refd)***
Ghazali Salleh & Anor v. PP [1993] 3 CLJ 638 HC ***(refd)***
Gray v. Perpetual Trustee Co. Ltd [1928] AC 391 ***(refd)***
Hock Hua Bank Bhd v. Leong Yew Chin [1987] 1 CLJ 126; [1987] CLJ (Rep) 126 SC ***(refd)***
In Re Dale [1994] Ch 31 ***(refd)***
Lord Walpole v. Lord Orford [1797] Ves 402 ***(refd)***
Mohd Ali Jaafar v. PP [1998] 4 CLJ Supp 208 HC ***(refd)***
Ng Yan Pee v. PP [1959] 3 MC 249 ***(refd)***
Olins v. Walters [2008] EWCA Civ 782 ***(refd)***
PP v. Chia Yong Hee [1997] 2 CLJ Supp 263 HC ***(refd)***
R v. Chen [1993] 2 VR 139 ***(refd)***
Re Cleaver [1981] 2 All ER 1018 ***(refd)***
Re Goodchild [1997] 3 All ER 63 ***(refd)***
Stone v. Hoskins [1905] P 194 ***(dist)***
Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 FC ***(refd)***
Yoong Leok Kee Corporation Sdn Bhd v. Chin Thong Thai [1981] 1 LNS 75 FC ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 20 r. 5

Other source(s) referred to:
Mellows, *The Law of Succession*, 5th edn, p 28
Theobald, *Wills*, 15th edn, p 28

For the plaintiff - G Nanda Goban; M/s Goban & Co
For the defendants - Muralee Menon (Melvin Cheah Yong Soon with him); M/s Jaafar & Menon

Reported by Baizura Abd Razak

JUDGMENT

Harmindar Singh Dhaliwal JC:

Introduction

[1] It is not uncommon for husbands and wives to make identical wills, sometimes referred to as corresponding or mirror wills, containing reciprocal provisions as to the distribution of their estates in the event of their death. They may wrongly assume that with such wills in place, there is in existence a mutual promise

which each spouse is not entitled to renege or revoke. In other words, they think that what they have is what the law calls mutual wills. Unless the irrevocability of the mutual promise is inserted in the wills, disputes will arise as the instant action demonstrates.

[2] Be that as it may, there is however a dearth of litigation in Malaysia or even elsewhere with regards to mutual wills. The reason for this may be more apparent than it seems. At the time of distribution of the estate, one party is already dead and the beneficiaries may be none the wiser as to the terms of the wills which is a travesty in itself. The instant action is however one of those rare cases which have made it to the courts.

The Parties

[3] Who are the parties to the instant action? The plaintiff, a Japanese national and permanent resident of Malaysia, is the step-father of the 1st and 2nd defendants. The 1st and 2nd defendants are brother and sister. Their mother, the late Madam Chiang Yoon Mooi ("deceased") married the plaintiff on 12 March 2002. Prior to this, the deceased was married to one Law Yoke Kiong. That earlier marriage ended in divorce on 16 August 2000. The defendants were the product of that failed marriage. The deceased however succumbed to an illness and died on 21 March 2010.

The Dispute

[4] What is the nature of the dispute? It is essentially a family quarrel over property. The dispute arose after the death of the deceased. The plaintiff and the deceased had made almost identical wills dated 14 October 2002 and 15 October 2002 respectively ("2002 wills"). The deceased however executed another will dated 16 February 2007 ("new will") whereby she bequeathed all her property to the defendants with nothing for the plaintiff.

[5] Upon the death of the deceased, the defendants obtained on 11 May 2010 a grant of probate to administer the estate of the deceased *vide* probate petition No. S-32-308-2010. The plaintiff subsequently entered a citation in the probate proceedings to prevent the defendants from administering the estate of the deceased. The plaintiff has now filed this action seeking, amongst others, declarations that the will of the deceased dated

16 February 2007 is invalid, that the mutual wills of 2002 be given effect and that the grant of probate be annulled. The defendants have counterclaimed for the citation to be struck out, for the plaintiff to deliver vacant possession of two properties under the new will and damages and costs.

The Issues

[6] Arising from the factual matrix in this case, the core issue is whether there were in fact mutual wills entered into by the plaintiff and the deceased. As far as the instant action is concerned, the dispute is confined to two properties, namely two apartments known as No. 76-3 and No. 98-1, Seri Duta 1 Condo, Jalan Gallagher, Taman Duta, Kuala Lumpur ("the Seri Duta properties").

The Legal Principles

[7] The term "mutual wills" is used to describe joint or separate wills made as a result of an agreement between the parties to create irrevocable interests in favour of ascertainable beneficiaries (*Theobald on Wills*, 15th edn., at p. 28). Mutual wills have also been described as wills made by two persons, usually in substantially the same terms and conferring reciprocal benefits, following an agreement between them to make such wills and not to revoke them without the consent of the other (Mellows: *The Law of Succession*, 5th edn., at p. 28).

[8] Now of course there is some conflict in this principle as a will by its very nature and essence is a revocable instrument. This conflict was explained in Mellows: *The Law of Succession* (*supra* at 28) as follows:

> Mutual wills involve a conflict of principle. Wills are mutual wills only if made in pursuance of a prior agreement not to revoke without the consent of the other. This is a contract and is enforceable. On the other hand, it is a cardinal principle of the law of wills that a will may always be revoked. The solution to the conflict which has been evolved is that the will itself may always be revoked, but such revocation may give rise to an action for breach of contract. Furthermore, it is established that on the death of the first person to die, a trust arises in favour of the beneficiaries, and if the survivor revokes his will proceedings may also be taken for breach of trust.

[9] This long-established doctrine of mutual wills stems from the decision of Lord Camden LC in *Dufour v. Pereira* (1769) 1 Dick 419. The facts of that case were described in the case of *Re Dale* [1994] Ch 31 as follows. A husband and wife made a joint will pursuant to an agreement between them whereby the residuary estate of them was to constitute a common fund to be held for the survivor for his or her life with remainders over. On the death of the husband, the wife, who was one of his executors, proved the will and thereafter took possession of her husband's property and enjoyed the benefit of his residuary estate. On her death, it was discovered that her last will disregarded the provisions of the joint will and left her estate to her daughter. The plaintiffs, who were the beneficiaries under the joint will, claimed that the wife's personal estate was held in trust for them.

[10] Lord Camden LC's decision was in the following terms:

> Consider how far the mutual will is binding, and whether the accepting of the legacies under it by the survivor is not a confirmation of it. I am of opinion it is. It might have been revoked by both jointly; it might have been revoked separately, provided the party intending it, had given notice to the other of such revocation. But I cannot be of opinion, that either of them, could, during their joint lives, do it secretly; or that after the death of either, it could be done by the survivor by another will.
>
> It is a contract between the parties, which cannot be rescinded, but by the consent of both. The first that dies, carries his part of the contract into execution. Will the court afterwards permit the other to break the contract? Certainly not.

[11] And he further added (as reflected in *Gray v. Perpetual Trustee Co. Ltd* [1928] AC 391):

> The law of these countries then must be very defective, and totally destitute of the principles of equity and good conscience: for nothing can be more barbarous, than a law, which does permit in the very text of it one man to defraud another. The equity of this court abhors the principle. A mutual will is a mutual agreement. A mutual will is a revocable act. It may be revoked by joint consent clearly. – By one only, if he give notice, I can admit. But to affirm, that the survivor (who has deluded his partner into his will upon the faith and persuasion that he would perform his part) may legally recall his contract, either secretly during the joint lives, or after at his pleasure; I cannot allow.

The mutual will is in the whole and every part mutually upon condition, that the whole shall be the will. – There is a reciprocity, that runs through the instrument. The property of both is put into a common fund and every devise is the joint devise of both. This is a contract. If not revoked during the joint lives by any open act, he that dies first dies with the promise of the survivor, that the joint will shall stand. It is too late afterwards for the survivor to change his mind: because the first to die's will is then irrevocable, which would otherwise have been differently framed, if that testator had been apprised of this dissent. Thus is the first testator drawn in and seduced by the fraud of the other, to make a disposition in his favour, which but for such a false promise he would never have consented to.

It was argued however, that the parties knowing that all testaments were in their nature revocable, were aware of this consequence, and must therefore be presumed to contract upon this hazard. There cannot be a more absurd presumption than to suppose two persons, while they are contracting, to give each a licence to impose upon the other. Though a will is always revocable, and the last must always be the testator's will; yet a man may so bind his assets by agreement, that his will shall be a trustee for performance of his agreement. A covenant to leave so much to his wife or daughter, etc. Or suppose he makes his will, and covenants not to revoke it. These cases are common; and there is no difference between promising to make a will in such a form and making his will with a promise not to revoke it. This court does not set aside the will but makes the devisee heir or executor trustee to perform the contract ...

The instrument itself is the evidence of the agreement; and he, that dies first, does by his death carry the agreement on his part into execution. If the other then refuses, he is guilty of a fraud, can never unbind himself, and becomes a trustee of course. For no man shall deceive another to his prejudice. By engaging to do something that is in his power, he is made a trustee for the performance, and transmits that trust to those that claim under him. This court is never deceived by the form of instruments. The actions of men here are stripped of their legal clothing, and appear in their first naked simplicity. Good faith and conscience are the rules, by which every transaction is judged in this court; and there is not an instance to be found since the jurisdiction was established, where one man has ever been released from his engagement, after the other has performed his part.

[12] Lord Camden's pronouncement has been considered and accepted in many cases. It was considered in *Stone v. Hoskins* [1905] P 194, a case much relied upon by the defendants, where Sir Gorell Barnes P, concluded:

> It appears to me that the result is tolerably plain. If these two people had made wills were standing at the death of the first die, and the survivor had taken a benefit by that death, the view is perfectly well founded that the survivor cannot depart from the arrangement on his part, because, by the death of the other day, the will of that party and the arrangement have become irrevocable; but that case is entirely different from the present, where the first person to die has not stood by the bargain and her 'mutual' will has in consequence not become irrevocable. The only object of notice is to enable the other party to the bargain to alter his or her will also, but the survivor in the present case is not in any way prejudiced. He has notice as from the death. I cannot see that the cases cited support the proposition for which the defendant contends, with the result that he must, I think, fail to obtain the declaration which he seeks.

[13] What is highlighted from the cases from *Dufour v. Pereira* onwards is the equitable nature of the doctrine as it operates from the conscience of the parties to the agreement. I will return to the application of the equitable principles to this doctrine later in the judgment.

[14] What are the principles underlying this doctrine? What is required to prove mutual wills is that: (a) there was a prior agreement by the testators to make mutual wills intending their agreement to become irrevocable on the death of the first to die; and (b) the making of the mutual will (*Olins v. Walters* [2008] EWCA Civ 782; *Charles v. Fraser* [2010] EWHC 2154 (Ch); *Fry v. Densham-Smith* [2010] EWCA Civ 1410). Shortly stated, it must be established that there was an irrevocable agreement to distribute the estates in a particular way at the time of the making of the mutual wills.

[15] So how is this agreement to be proved? The fact that the wills were executed at the same time and have the same terms is a relevant consideration but by no means conclusive (*Re Cleaver* [1981] 2 All ER 1018). The agreement may be oral or in writing, be incorporated in the will or proved by extraneous evidence. The agreement must be established by clear and satisfactory

evidence on the balance of probabilities (*Re Goodchild* [1997] 3 All ER 63). What is decisive at the end of the day is that there was an agreement by the testators for the wills to be irrevocable and to remain unaltered – a common intention, expectation or desire will not suffice (*Re Goodchild, supra*). It may therefore be insufficient for a husband and wife to merely have corresponding wills or mirror wills as they may carry no obligation to be irrevocable.

Were The Wills Executed By The Plaintiff And The Deceased Mutual Wills?

[16] Coming back to the instant case and having these principles in mind, did the plaintiff and the deceased execute mutual wills? Before a resolution can be found to this all-important question, it is necessary to go back in time and revisit the relationship between the parties and the circumstances which gave rise to the execution of the 2002 wills. It was sometime in 1985 that the plaintiff first met the deceased. The deceased was then working as a lounge waitress at the Kangaroo Lounge in Bukit Bintang, Kuala Lumpur. She was also a single mother forced to support herself and her two young children, the defendants, as her husband had abandoned the family in 1981. The plaintiff and the deceased grew fond of each other and fell in love.

[17] In early 1986, the deceased invited the plaintiff to live with her in her rented flat at No 6318 Blueboy Mansion off Jalan Tong Shin, Kuala Lumpur. She ceased working as a lounge waitress and depended on the plaintiff to provide for her and her two children, the defendants. At that time, her two children were living with their grandparents in Bentong, Pahang. The plaintiff then helped her with funds to purchase flat No 6217 at Blueboy Mansion in which they later lived together from the latter part of 1986. Beginning in 1989, the deceased's two children, the defendants, lived with them during the school holidays.

[18] Subsequently, the deceased wanted to have security in her relationship with the plaintiff. She filed for divorce from her first husband on the grounds of desertion. The divorce was made absolute on 19 February 2001. She then married the plaintiff on 12 March 2002. The couple then moved into their matrimonial home at No 76-3 Seri Duta Condominium, Taman Duta Kuala Lumpur. This property was purchased by the plaintiff for the sum

of RM1,037,400 and registered in the joint names of the plaintiff and the deceased. The deceased also purchased two other properties, namely No 98-1 Seri Duta Condominium, Taman Duta Kuala Lumpur on 5 March 1992 and an apartment in Cameron Highlands on 6 September 1993.

[19] The plaintiff also helped the deceased to open bank accounts and provided regular deposits for her benefit. He also bought for her jewelry made of gold, platinum, diamonds, precious stones and expensive wrist watches. The plaintiff also paid for all the educational expenses of the 1st and 2nd defendants in Malaysia and overseas. The 1st defendant left for tertiary studies in the USA in 1997 and the plaintiff provided all the money she needed for her tuition and living expenses until 2004. The plaintiff also paid for all the educational expenses of the 2nd defendant in the USA from July 2002 until May 2005.

[20] Now there was some evidence that the deceased had money of her own and contributed to the properties acquired and expenses incurred. The defendants testified that the deceased was a restaurant operator and boutique owner. She was also alleged to be a part-time broker for property sales as well as a middleman for jewelry and expensive handbags. In the end, these remained bare oral assertions unsupported by any other evidence. The plaintiff instead was a director of a Japanese construction firm before he retired and worked as a consultant for construction projects. I considered that he was the one with the means, rather than the deceased, to purchase the properties mentioned in the will.

[21] Shortly after the marriage, the deceased expressed her concerns over what might happen to her in the event of the plaintiff's death overseas or in Japan. Both of them then had serious discussions over the need to have some kind of written agreement regarding the plaintiff's properties as well as the properties in their joint names in Malaysia. After discussion with various people, the deceased and the plaintiff decided that a good method would be to make corresponding wills.

[22] To this end, the plaintiff and the deceased discussed the matter with one Ms Lim Siew Mee (PW1) with whom they had come to know when PW1 was working as a Manager with Ban

Hin Lee Bank in Kuala Lumpur. PW1 had left the bank and was now a certified financial planner and consultant with IppAdvisors Sdn Bhd as a professional will writer for Rockwills. In September 2002, PW1 came over to the matrimonial home and took instructions over the terms and contents to be included in the corresponding wills.

[23] On 27 October 2002, upon prior appointment, PW1 came to the matrimonial home with two sets of wills which she had prepared in accordance with the instructions given by the deceased and the plaintiff. Also present at the same time were the family friends of the plaintiff and the deceased, one Ms Lim Yoon Foong (PW2) and her husband Mr Siang Yam Beng (PW3). PW2 and PW3 had been requested earlier to be present to witness the signing of the wills. Before the signing of the wills, the deceased had declared to PW2 and PW3 that she and the plaintiff had made an agreement to make similar and corresponding wills and had promised to each other never to change the contents of their wills until death. The wills were then signed by the deceased and the plaintiff.

[24] In relation to the Seri Duta properties which are the subject matter of this suit, this is what the plaintiff and the deceased had declared in the said will. In the deceased's will it was stated in paras. 5 and 6:

> 5. I give to my husband HIROTO WATANABE Passport No. TZ0045613 my undivided share in the house known as 98-1 Seri Duta Condominium, Jalan Gallagher, Taman Duta, 50480 Kuala Lumpur. If my husband does not survive me then I give to my daughter LAW YEN YEN NRIC NO. 790316-14-5724.
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> 6. I give to my husband HIROTO WATANABE Passport No. TZ0045613 my undivided share in the house known as 76-3 Seri Duta Condominium, Jalan Gallagher, Taman Duta, 50480 Kuala Lumpur. If my husband does not survive me then I give to my son LAW CHOONG HOE NRIC NO. 820815-14-5037.

And the same corresponding declaration was made by the plaintiff in his will.

[25] Now coming back to the question that was posed at the outset – did the plaintiff and the deceased execute mutual wills? – the answer must plainly be in the affirmative. The reasons for this are as follows.

[26] Firstly, the wills were made at the same time and in almost exactly the same terms. Secondly, and more importantly, the deceased was concerned about her future and especially that of her children. This was not disputed. She was concerned that the plaintiff would leave for Japan and her children, the defendants, would be deprived of any inheritance. The detailed nature of the will and especially the contents showed that in the event she predeceased the plaintiff, her two children would be provided for. That was her main concern and that was why she was happy and relieved when the two wills were signed and executed by the plaintiff. She clearly intended the wills to be irrevocable. Thirdly, she had expressly stated to the witnesses to the wills, PW2 and PW3 that there was a promise by both to never change the wills. This was also supported by the evidence of the plaintiff.

[27] The deceased's concern about providing for the children was again manifested by the transfer of the plaintiff's half share in the Seri Duta properties to her which I shall come back to in a moment. I think she wanted the properties to be transferred to her name as she was concerned about the children. I have therefore no doubt that there was an agreement between the plaintiff and the deceased that the terms of the wills would be irrevocable.

[28] To come back to the transfer of the plaintiff's half share of the Seri Duta properties to the deceased, it appeared that for some reason, the deceased was still not satisfied with the mutual wills. The plaintiff claims the deceased managed to get him to transfer his half share of the Seri Duta properties to herself to prove his love and devotion for her as she had questioned his sincerity and commitment to the mutual wills. The defendants however say that the plaintiff did so as he had withdrawn most of the money from the joint account in Singapore and it also emerged that he had had sexual relations with their maid. The plaintiff strenuously denied these allegations.

[29] Some evidence of the plaintiff's sexual indiscretions was sought to be introduced by way of the maid's statement to the solicitor acting for the deceased as well as another alleged statement of the plaintiff. These statements were however rejected as evidence as being inadmissible on account of being hearsay. The maid was not going to be called to give evidence and she

had not lodged any police report. The defendants, nevertheless, were quite resourceful. They had evidence of a secret recording of a conversation between the plaintiff and the deceased in which it was alleged that the plaintiff had admitted to having sexual relations with the maid. Arguments were raised as to the admissibility of this recording. The parties relied on the following cases: *PP v. Chia Yong Hee* [1997] 2 CLJ Supp 263; *Ghazali bin Salleh & Anor v. PP* [1993] 3 CLJ 638; *Mohd Ali Jaafar v. PP* [1998] 4 CLJ Supp 208 and *Ng Yan Pee v. PP* [1959] 3 MC 249.

[30] In *Mohd Ali Jaafar v. PP*, *supra*, Augustine Paul J (as he then was) alluded to six matters that must be established when introducing evidence of a tape recording. He also alluded to the necessity of taking three further precautionary steps. Whilst I have no quarrel with these matters, with the advent of digital technology, some of these matters may perhaps have to be modified. It ought to be observed that *Mohd Ali Jaafar v. PP* and the cases before it dealt with analogue recordings on a magnetic tape unlike the instant action which involved a digital recording made with a digital recorder. Needless to say, the technology involved in each case is significantly different. It may be fair to say that analogue recordings have become almost obsolete. In any event, in *R v. Chen* [1993] 2 VR 139, a case cited with approval in *Mohd Ali Jaafar v. PP*, the Supreme Court of Victoria held that the admissibility of tape recordings depends on the circumstances of each case. It was further held (at p. 150):

> The test is whether there is sufficient material before the Court to allow the tribunal of fact acting reasonably to conclude that the recorded sounds reproduce those originally made by the persons identified by the evidence. In other words, there must be evidence, which the tribunal of fact is entitled to accept, that the recording is of a conversation which occurred and which would be admissible if proved by oral testimony. In our opinion, admissibility does not depend on the party tendering the tapes having removed absolutely any chance that they are inaccurate.

[31] Having heard the recording and perusing the transcript, I had serious doubts as to whether the transcript accurately reflected the conversation that took place. This is so because the sound recording was poor, inaudible at times, broken and for the most part unintelligible. In my view, the recording was wholly unreliable to prove anything. For this reason, I considered it unsafe to rely on this evidence and it was accordingly rejected.

[32] Whatever may have been the reason for the transfer of the half share in the Seri Duta properties, contemporaneous with the time the plaintiff had agreed to transfer his half share to the deceased, the deceased went on to execute another will on 16 February 2007 ("new will"). She employed the same solicitors who had handled the transfer of the half share in the Seri Duta properties to also prepare her new will with the intention of revoking all earlier wills. Ominously, the execution of the new will was done without notice to the plaintiff and certainly without his knowledge and consent. By this act, the deceased had reneged on her promise to the plaintiff. This was clearly a breach of her agreement. Some would call it a betrayal.

[33] Now the defendants suggest that there had already been revocation of the earlier wills expressly or by conduct with the effect that the wills were no longer binding on the parties as some of the funds had been dissipated and some properties sold. They particularly took issue with the fact that the plaintiff had transferred his half share of the Seri Duta properties to the deceased.

[34] In my view, I do not see anything sinister in the fact that funds were utilised and some properties were disposed of. To my mind, there will of course be some dealing with regard to the properties set out in the wills. Circumstances may change which may warrant utilisation of the properties or moneys. Both parties may need to use the money. The assets mentioned in the mutual wills may be akin to a floating trust which crystallises upon death (see *Birmingham v. Renfrew* [1936] 57 CLR 666 at 689). In the event, I do not see how this affects the agreement of the parties that the wills are to remain irrevocable. I think what is crucial is that neither party acts to the detriment of the other. In transferring the Seri Duta properties to the deceased, the plaintiff, far from acting to the detriment of the deceased, was actually acting in her interest. It is curious to suggest that after the plaintiff had acted in the interest of the deceased, the deceased is now released from her promise.

[35] I have also not overlooked the defendants' contention that in the transfer of the Seri Duta properties, the plaintiff was also represented by lawyers and that there was no reference at all in the correspondence to the mutual wills. The plaintiff only alluded

to the possibility of divorce. In all fairness, I do not see how this can be inferred against the plaintiff. He was obviously relying on the irrevocable promise of the deceased in her 2002 will. He knew that if he outlived the deceased, the properties would still come to him. He was therefore only concerned with the possible ramifications upon divorce.

[36] In the end, it was not the plaintiff but the deceased who broke the promise. She did so without giving notice to the plaintiff. I cannot help but agree with the plaintiff's depiction that this whole business was conducted surreptitiously. What is most damming is the fact that the deceased's last will of 2007 talked of the possibility of the plaintiff transferring his half-share to the deceased. All this left me with the impression that it was all pre-planned and well-executed. The plan was to get the plaintiff to transfer his share of the properties and then for the deceased to revoke her will and deprive the plaintiff of his interest in the properties under the mutual wills.

[37] I think it is trite law, as demonstrated by the cases I had alluded to at the outset, that the promise made in the mutual wills cannot be lightly disregarded. It has long been established that when one acts on the faith of an agreement to make mutual wills, equitable obligations will arise to prevent the offending party from acting unfairly. In this regard, perhaps the most enlightening analysis of the principles involved in mutual wills was a passage in the judgment of the High Court of Australia in *Birmingham v Renfrew, supra*, where Dixon J stated (at p. 682):

> I think the legal result was a contract between husband and wife. The contract bound him, I think, during her lifetime not to revoke his will without notice to her. If she died without altering her will, then he was bound after her death not to revoke his will at all. She on her part afforded the consideration for his promise by making her will. **His obligation not to revoke his will during her life without notice to her is to be implied**. For I think the express promise should be understood as meaning that if she died leaving her will unrevoked then he would not revoke his. *But the agreement really assumes that neither party will alter his or her will without the knowledge of the other*. It has long been established that a contract between persons to make corresponding wills gives rise to equitable obligations when one acts on the faith of such an agreement and dies leaving his will unrevoked so that the other takes property under its dispositions. It operates to impose upon the survivor an obligation regarded as specifically enforceable (emphasis added).

[38] In coming to this view, Dixon J was no doubt influenced by a passage in the paper on the *Walpole Case* (*Lord Walpole v. Lord Orford* [1797] Ves. 402), contained in *Hargraves's Juridical Arguments* (1799) as follows:

> In these circumstances, there is such a combination, that it seems to me impossible to deny the existence of compact between the two testators. A mutual pledging is inferable from the beginning to the end of the transaction; is inferable from the two instruments themselves; is inferable from every thing preceding and every thing accompanying the actual execution of them. The whole transaction speaks the language of mutual engagement most emphatically in every part. The evidence of the engagement is the thing itself. Except on the idea of mutual concession and mutual engagement, the transaction is unintelligible. Nor is the nature of the compact less apparent. Both of the instruments being equally revocable, it is plain, that the contracting parties did not mean absolutely to exclude themselves from making new arrangements. Had that been their meaning, instead of mutual wills, which are in their nature revocable, they would have made mutual irrevocable deeds of settlement. On the other hand, it is in my opinion as plain, that the two contracting parties did not mean that one should have more liberty of revocation than the other. *Consequently they must have intended, that during their joint lives neither should revoke secretly and clandestinely; and that after the death of one without revoking the right of revoking should cease to the other*. Upon any other footing, it would have been a transaction of mutual wills, with a licence to both parties to impose upon each other at pleasure; and instead of a fair honorable and equal bargain, it would have been one of a kind the most hollow deceptive and ensnaring (emphasis added).

[39] And Dixon J came to the conclusion that equity implied a trust:

> But I do not see any difficulty in modern equity in attaching to the assets a constructive trust which allowed the survivor to enjoy the property subject to a fiduciary duty which, so to speak, crystallized on his death and disabled him only from voluntary dispositions *inter vivos.* On the contrary, as I have said, it seems rather to provide a reason for the intervention of equity. The objection that the intended beneficiaries could not enforce a contract is met by the fact that a constructive trust arises from the contract and the fact that testamentary dispositions made upon the faith of it have taken effect. It is the constructive trust and not the contract that they are entitled to enforce.

[40] Considering the jurisprudence regarding this doctrine of mutual wills, it is trite that a court of equity will not permit any transfer of property which is inconsistent with a legally binding obligation. It is also trite that equity attaches to the principle of irrevocability in the doctrine of mutual wills which comes into operation when the first to die does so without revoking his or her will. I am also inclined to hold, as the cases suggest, that the principles of equity are equally applicable where the survivor has acted to his detriment or has suffered serious prejudice when acting in full faith and reliance on the agreement or understanding reached between the testators at the time of execution of the mutual wills. This will be especially apparent in the situation where the first to die had acted unilaterally and without notice or worse still, had acted in a secret or clandestine fashion in revoking the will entered into on an irrevocable basis. In my judgment, this was precisely the case in the instant action when the deceased acted unconscionably in revoking her 2002 will secretly to the detriment and prejudice of the plaintiff.

[41] I have noted the defendants' submission that the case of *Stone v Hoskins, supra*, puts the nail in the coffin of the plaintiff's claim. With respect, I think that observation is misconceived. Unlike the situation in *Stone v. Hoskins*, there has certainly been serious prejudice to the plaintiff in the instant case. To put it bluntly, the defendants, his step-children, would now be able to kick the plaintiff out of the marital home. It would be unjust and unconscionable to permit the deceased and now her estate and her children to profit from her breach to the detriment and prejudice of the plaintiff.

Application For Amendment

[42] At the end of the trial, the plaintiff filed an application in encl. 32 to re-amend his amended statement of claim. This application was opposed by the defendants. By this proposed amendment, the plaintiff sought to include in the claim two paragraphs which set out the duties of the defendants as trustees in accordance with equitable principles. There was also sought to be included an additional prayer for declaratory relief as follows:

A Perintah bahawa jika Wasiat Chiang Yoon Mooi (si-mati) bertarikh 16/2/2007 didapati wasiat yang sah dan berkesan dan telah menggantikan wasiat Chiang Yoon Mooi bertarikh 16/2/2007 maka Defendan-Defendan sebagai wasi dan pemegang amanah kepada harta pusaka si-mati memegang harta-harta tertentu bagi pihak Plaintif di bawah amanah iaitu harta-harta dimana Plaintif telah dinamakan benefisiari dalam wasiat si-mati bertarikh 15/10/2002.

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[43] Order 20 r. 5 of the Rules of the High Court 1980 ("RHC") sets out the principles governing amendments to pleadings. In a nutshell, this provision allows amendments to be made at any C stage of the proceedings on such terms as to costs or otherwise as may be just and in such manner as the court may direct. This rule implies that an amendment ought to be allowed if such amendment causes no prejudice or injustice which cannot be compensated by costs or other means.

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[44] The Federal Court in *Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors* [1983] 1 MLJ 213 approved the following approach in dealing with amendment applications (at headnotes):

E The general principle is that the court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result, (1) whether the application is *bona fide*; (2) whether prejudice caused to the other side can be compensated by costs and (3) whether the amendments would not F in effect turn the suit from one character into a suit of another and inconsistent character.

[45] In *Hock Hua Bank Bhd v. Leong Yew Chin* [1987] 1 CLJ 126; [1987] CLJ (Rep) 126, the Supreme Court in considering the general principles in the grant of leave to amend adopted a G passage from *The Supreme Court Practice 1985* as follows (per Abdul Hamid Omar Acting LP at p. 129):

It is a guiding principle of cardinal importance on the question of amendment that, generally speaking, all such amendments ought H to be made 'for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings' (see per Jenkins LJ in *GL Baker Ltd v. Medway Building & Supplies Ltd* [1958] 1 WLR 1216 at 1231; [1958] 3 All ER 540 at 546).

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> It is a well established principle that the object of the court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights ... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as matter of favour or grace ... It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right' (per Bowen LJ in *Cropper v. Smith* [1883] 26 Ch D 700 at 710 to 722, with which observations AL Smith LJ expressed 'emphatic agreement' in *Shoe Machinery Co v. Cultam* [1896] 1 Ch 108 at 112).

[46] On the question of delay in applying for the amendment, the Court of Appeal in *Datuk Dr Soon Choon Teck v. Datuk Robert Lau Hoi Chew & Ors* [2010] 7 CLJ 931 had this to say (per Sulaiman Daud JCA at p. 943):

> It is a well settled principle that an amendment ought in general be allowed even if it comes late, if it is necessary to do justice between the parties, so long any hardship done thereby can be compensated in money (per Lord Denning in *Associated Leisure Ltd (Photographic Equipment Co Ltd) v. Associated Newspaper Ltd* [1970] 2 QB 450, at p 455). A similar view was expressed by Abdul Malik Ishak J (as he then was) in the case of *Ultra Dimension Sdn Bhd v. Sepadan Tuah Sdn Bhd, Genesis The AS Agency Sdn Bhd (Third Party)* [2000] 6 CLJ 548, where he quoted the passage from the judgment of *Brett MR in Clarapede v. Commercial Union Association* [1883] 32 WR 263, as follows:
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> > However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs.
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> Further, in *HSBC Bank Malaysia Bhd v. Macquarie Technologies (Malaysia) Sdn Bhd & Another Appeal, supra*, Nik Hashim JCA (as he then was) said, at p. 129:

A On the question of delay, it is worthy of note that delay alone is not a ground to refuse an application for leave to amend. In *Wright Norma, supra*, at p. 519 the court held:

> While the time at which an amendment is made is a relevant consideration it is not necessarily decisive. Delay per se does not equal prejudice or injustice. We do not think any rigid rule can be laid down on this.

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[47] In *Bumiputra-Commerce Bank Bhd & Ors v. Bumi Warna Indah Sdn Bhd* [2004] 4 CLJ 825, Abdul Malik Ishak J (as he then was), after referring to several authorities, affirmed the principle that amendments to pleadings are allowed before trial, during trial, before judgment, after judgment and even when there is a pending appeal against a judgment. Consistent with this principle, Ajaib Singh J (as he then was) in *Yoong Leok Kee Corporation Sdn Bhd v. Chin Thong Thai* [1981] 1 LNS 75 allowed an amendment after the conclusion of a trial on the ground that the amendment was in the interest of justice. This approach was confirmed by the Federal Court where it was held (in the same report at p. 22) that the amendment made did not prejudice the appellant.

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[48] In the instant case, although the application for amendment was made very late in the proceedings, I considered that it was made *bona fide*. There was no ploy in this case to delay proceedings or to seek some unfair advantage. In essence as well, the character of the suit remains the same. There is no question of turning the suit from one character into another. The only issue of concern is whether the amendment would cause injustice to the defendants which cannot be compensated by costs. In this regard, it is noteworthy that by this amendment, the plaintiff is not introducing new material facts or a new cause of action but merely pleading the legal result that obtains from the material facts already pleaded. The legal issue that results from this amendment is whether equitable principles apply to create a trust from the facts pleaded. There is therefore, to my mind, no prejudice to the defendants since the issue being essentially a legal one, no new witnesses are required and no witnesses need to be recalled. Being legal issues as well, these can be raised and settled during submissions. I do not think the parties can say they are caught by surprise either in that if they had done the research on the

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law pertaining to mutual wills, as they are obligated to do even before filing any claim or defending a claim, it will become patently obvious that equitable principles are both relevant and significant.

[49] For these reasons, and in order to determining the real question in controversy between the parties and in the interests of justice, I exercised my discretion in favour of allowing the amendments sought. Accordingly, the application in encl. 32 was allowed with costs to the defendants in any event.

Conclusion

[50] In the circumstances, and for the reasons I have stated, I hold that the deceased's last will dated 16 February 2007 is valid and enforceable except that the executors, who are the defendants in this case, will hold the Seri Duta properties on trust for the plaintiff in accordance with the terms of the 2002 wills. Parties are at liberty to apply for further orders on ancillary matters. The counter-claim is dismissed. The plaintiff is also entitled to one set of costs assessed at RM10,000.